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PP

v.

HO AH TEE

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HIGH COURT MALAYA, SHAH ALAM
NOOR AZIAN SHAARI J
[CRIMINAL TRIAL NO: 45B-1-2011]
17 JANUARY 2012

C ***CRIMINAL LAW:*** *Penal Code - Section 302 - Murder - Prima facie case - Whether established - Accused slashed deceased with parang - Whether accused knew act would cause bodily injury and was likely to cause death - Ingredients of murder under s. 300(d) Penal Code - Whether proved - Defence of non-awareness due to hypoglycemia state*
D *when committing the act - Whether accused in control of his actions - Whether defence failed*

CRIMINAL LAW: *Penal Code - Section 300(d) - Ingredients of murder - Whether proved - Accused slashed deceased with parang - Whether accused knew act would cause bodily injury and was likely to*
E *cause death - Whether accused had intention to cause death*

CRIMINAL LAW: *Murder - Defence - Defence of unawareness or automatism by reason of hypoglycemia - Accused slashed deceased with parang - Whether person in hypoglycemia state would be able to perform*
F *such act requiring strength - Whether weight of evidence clearly established accused was in control of his actions - Whether defence failed*

The accused was charged under s. 302 of the Penal Code for the murder of his neighbour ('the deceased'). On 12 August 2010, at
G 8.30am, the deceased had just returned home from jogging when the accused approached the deceased, swung a parang and hit the deceased. This incident was witnessed by SP4 and SP8 who saw the accused slash the deceased at the head and the neck of the deceased, after which the deceased fell on the road. The post
H mortem conducted on the deceased certified that the deceased died as a result of injuries to the neck. The prosecution in this case relied on limb 4 *ie*, s. 300 (d) of the Penal Code and as such, the prosecution needed to prove that the accused knew that the act would cause bodily injury and was likely to cause death and
I such act was with the intention to cause death. The prosecution had therefore proven a *prima facie* case against the accused which if unrebutted would warrant a conviction. The accused, in his

defence, submitted that he was a diabetic, thus he intimated the defence of non-awareness on automatism due to his hypoglycemia state when he committed the act.

Held (accused found guilty and convicted):

(1) In order to examine whether the defence of unawareness or automatism due to the attack of hypoglycemia could succeed in this case, the accused called an expert, *ie*, SD4, a consultant psychiatrist, to testify as to the accused's condition when the incident happened. In rebuttal, the prosecution called SP11, an endocrinologist, the right field for diabetes and hypoglycemia. SD4 was called by the defence to give evidence for the accused, thus this would mean he was a non-independent witness whilst in comparison, SP11 was an employee of UKM Medical Centre and would have no interest whatsoever in this case. Therefore, the court had no choice but to accept SP11 as the right/appropriate independent expert. (paras 32-34, 37, 40 & 41)

(2) For an attack of hypoglycemia, there would be symptoms/warning signs, like hunger and weakness. In the case of the accused, there were no such symptoms. A person in a hypoglycemia state would not be able to perform "an act that required strength, repetitively is impossible." In this case, the accused had slashed the deceased at three places, acts which a person under such an attack could not have done. It was thus clear, if the accused was in a state of an attack of hypoglycemia, he would not have had the strength to slash the deceased as he did and he would not have "recovered" so soon as to realise his act and ride the motorcycle to the police station. (paras 41 & 42)

(3) Having considered the evidence of SD4 and SP11, it was not probable that the accused was unaware of his act that caused the death of the deceased. The weight of evidence clearly established that the accused was very much in control of his action (*Kenneth Fook Mun Lee v. PP*). Therefore, the defence of unawareness or automatism by reason of hypoglycemia must fail. (para 43)

A **(4)** Since the prosecution had made out a *prima facie* case against the accused and the court found that the accused had not rebutted the prosecution's case, the accused was found guilty as charged, convicted and sentenced to death. (para 44)

B **Case(s) referred to:**
Balamurali Muthusamy v. PP [2011] 4 CLJ 128 CA ***(refd)***
Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC ***(refd)***
Khoon Chye Hin v. PP [1961] 1 LNS 41 HC ***(refd)***
Mirza Murtala v. PP [2010] 4 CLJ 150 CA ***(refd)***

C **Legislation referred to:**
Penal Code, ss. 300(d), 302

For the prosecution - Muhammad Asyraf Md Kamal; DPP
For the accused - Stanley Augustine; M/s Stanley Augustine & Co

D *Reported by Suhainah Wahiduddin*

JUDGMENT

E **Noor Azian Shaari J:**

[1] The accused was charged as follows:

> Bahawa kamu pada 12.08.2010, jam lebih kurang 8.30 pagi, bertempat di hadapan rumah No. 13, Jalan Sekolah, Pelabuhan
F Klang, di dalam daerah Klang, di dalam negeri Selangor Darul Ehsan, dengan niat telah melakukan kesalahan bunuh hingga menyebabkan kematian dengan menetak leher Teo Chai Hock, No. KPT 400918-10-5213 menggunakan sebilah parang dan adalah dengan ini kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.
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[2] For the trial, the prosecution called eleven (11) witnesses, they being:

1) SP1 – Lance Corporal Noraini binti Jaafar
H – Complainant
2) SP2 – ASP Ooi Chiew Peng
– Crime Scene Forensic Investigation Officer
I 3) SP3 – D/Sergeant Muhamed Anwan bin Ahmad Tarmizi
– Forensic Photographer

4) SP4 – Chow Seow Lian

– Eye witness

5) SP5 – Lance Corporal Kopral Jameson Mambang ak Langgong

– Photographer

6) SP6 – Nur Haliza binti Hassan

– Science Officer

7) SP7 – Dr Nur Ayutimasery Binti Abdullah

– Consultant Forensic Pathologist

8) SP8 – Ramayee a/p Munian

– Eye witness

9) SP9 – Inspektor Mohd Sokri Bin Ismail

– Arresting Officer

10) SP10 – ASP Mohd Sajidan bin Abdul Sukor

– Investigation Officer

11) SP11 – Dr Nor Azmi Kamaruddin

– An Endocrinologist

– Called as a rebuttal witness

Facts Of The Case As Adduced By The Prosecution

[3] On 12 August 2010 at about 8.30am, SP4 was in the hall of her house watching television with her mother in-law and son. SP4 saw her father in-law, Teo Chai Hock ("deceased") return home from jogging. The deceased parked his motorcycle outside the house as he usually did as he would leave the house at 6am to jog and return home around 9am.

[4] However before the deceased could open the gate, SP4 saw the accused coming from the direction of the house next door carrying a parang and going towards the deceased. The accused was known as "Uncle" and a neighbour since 1992. Suddenly the

A accused approached the deceased and swung the parang and hit the deceased. SP4 saw the deceased raise his hand to cover his face.

[5] This incident was witnessed by SP8 who was then carrying
B out her duty as a security officer at the nearby school. SP8 also had witnessed the argument between the accused and the deceased. According to SP8, the accused approached the deceased first and started quarreling loudly in Chinese.

[6] Both SP4 and SP8 saw the accused slash the deceased at
C the head while the accused moved to the centre of the road chased by the accused.

[7] SP4 took the key to the grill door of the house and screamed in Chinese to the accused "Uncle jangan menetak, nanti
D dia akan mati". However the appeal was ignored by the accused who instead said "Saya nak dia mati dan saya nak tikam kepala sampai patah!".

[8] SP4 saw clearly the accused slashed three times at the neck
E of the deceased after which the deceased fell on the road. The accused then went into his house compound, washed his hands and rode his motorcycle and left the scene.

[9] The accused then went to the Port Klang Police Station
F whereby on his information to SP1, SP1 directed police personnel to go to the scene ie, at 13, Jalan Sekolah, Port Kelang. SP1 also lodged a report ie, Port Kelang Report 005043/10 (P5).

[10] The post mortem conducted on the deceased certified that the deceased died as a result of the injury to the neck.

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[11] The accused is charged with s. 302 of the Penal Code ie, committing murder. Section 300 of the Penal Code states that "culpable homicide is murder" under the four circumstances listed:

H **300. Murder**

Except in the cases hereinafter excepted, culpable homicide is murder –

(a) if the act by which the death is caused is done with the intention of causing death;

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(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[12] The prosecution was relying on limb 4 ie, s. 300(d) of the Penal Code. As such, the prosecution needs only to prove that the accused knew that the act would cause bodily injury and is likely to cause death and such act was with the intention to cause death.

[13] Therefore, the prosecution need to prove that:

(1) Teo Chai Hock is dead;

(2) The accused knew that the act would probably cause death;

(3) The death is caused by the said injury; and

(4) The accused knew the danger of his act.

(1) Teo Chai Hock (Deceased) Is Dead

[14] There is no doubt that the deceased was Teo Chai Hock. The deceased was identified by SP4 (deceased's daughter in law), SP7 (Dr Nur Ayutimasery) and SP10 (the Investigation Officer).

Anyway there is no dispute on this fact.

(2) The Act By The Accused Was Imminently Dangerous

[15] There is evidence of SP4 and SP8 who saw the accused carrying a parang and slashing the hand, head and later the neck of the deceased.

[16] The evidence of SP4 and SP8 is corroborated by the evidence of SP6, an expert who stated that the slash wounds would have been caused by a sharp object especially the wound at the neck.

[17] It is a finding that the accused was the one who had caused the injuries to the deceased.

(3) The Injuries Caused The Death

[18] SP4 and SP8 had witnessed and stated that they saw the accused slash the deceased on the neck and the said injury was the one that caused that death.

[19] SP6 stated that the sustained slash wound to the neck was fatal in nature. The post mortem report (P40) states that "In my opinion the cause of death was slash wound to the neck.".

(4) The Accused Knew Of The Danger Of His Act

[20] This intangible element of knowledge must be proven. It is not intention. In the Court of Appeal case of *Balamurali Muthusamy v. PP* [2011] 4 CLJ 128 it was said that "We accept that this limb requires knowledge on the part of the appellant ie, a subjective requirement, that he knows that his acts were so imminently dangerous that they must in all probability cause death or such bodily injury as is likely to cause death." In the Federal Court decision of the case of *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359, it was held that – "In s. 300 of the Code allows no other reasonable meaning other than to say that knowledge is another element of *mens rea* for the offences of murder." Richard Malanjum (FCJ as he then was) at p. 386 said – "A plethora of cases have also answered any doubt that knowledge is a sufficient *mens rea* for the offence of murder."

[21] The following findings would indicate knowledge on the part of the accused:

(1) The way the accused approached the deceased;

(2) The way the accused slashed the deceased;

(3) The weapon used;

(4) Number of slashes; and

(5) Places of the slashes/attacks.

[22] Further, what was said by the accused in response to SP4's plea would show or go to prove knowledge of the danger of the accused's act – "Saya nak dia mati dan saya nak tikam kepala sampai patah."

[23] It must be noted that in the evidence of the prosecution witnesses there are discrepancies. However the discrepancies are not material and do not effect the prosecution case – *Khoon Chye Hin v. PP* [1961] 1 LNS 41; [1961] 27 MLJ 105. What is of prime importance is that the four ingredients were proven by the prosecution.

[24] However all said and done, there is really no dispute to the fact that the accused committed the act but intimated the defence of non awareness on automatism due to his hypoglycemia state. As such the cross-examination of the prosecution witnesses was mainly on the action of the accused in relation to the incident.

[25] The defence suggested its only defence ie, automatism by reason of hypoglycemia attack in the prosecution case but they will remain suggestions. In the Court of Appeal decision in *Mirza Murtala v. PP* [2010] 4 CLJ 150 it was held that "Suggestion made to the prosecution witnesses at the prosecution's stage by the defence are not evidence and remain mere suggestions." Therefore, they are not evidence. From the facts it is clear that the ingredients to constitute a charge under s. 302 of the Penal Code had been established by the prosecution.

[26] In fact by these suggestions, it can be concluded that it is not disputed that the accused caused the injuries that led to the death of the deceased but the accused was unaware of his act.

[27] The prosecution had therefore proven a *prima facie* against the accused which if unrebutted would warrant a conviction. The accused was then asked to enter his defence. After the three (3) alternatives were explained, the accused elected to give evidence on oath. The defence also called five (5) other witnesses. The defence witnesses were:

1) SD1 – The accused

2) SD2 – Peter Chin Teck Hock (Dr)

– A Medical Practitioner;

3) SD3 – Lam Chui Hwa

– Took photographs for the defence;

4) SD4 – Tan Sri Dato Sri (Dr) Mahadevan a/l A Mahalingam – Consultant Psychiatric;

5) SD5 – Hoo Chong Han – Son of the accused; and

6) SD6 – Lam Gek Choo – Wife of the accused.

Defence

[28] As suggested or advanced by the defence in the prosecution's case the defence story was that:

1) The deceased had allowed his gate to knock on the cement of the accused's house and this caused damage to the accused's premises and also disturbed the accused and his wife;

2) The accused is diabetic;

3) On the day in question the accused had taken his medication but was late in having his meal;

4) The accused was gardening;

5) The deceased approached the accused and uttered indecent words to the accused and hit the accused on the head. This caused the accused to react in anger;

6) The accused was not aware when he slashed the deceased.

[29] In short, the defence is that when the accused committed the act he was in a state of hypoglycemia and therefore unaware of what he was doing. The defence called SD4, a Consultant Psychiatric to give evidence of the accused's medical condition. In rebuttal, the prosecution called SP11 (Dr Nor Azmi bin Kamaruddin, a Medical and Endocrinology Consultant attached the University Kebangsaan Malaysia).

[30] The evidence of the defence is as follows:

1) The accused is diabetic since ten years prior to the date of the incident and obtained his medication from "Klinik Dr Peters" (the Clinic of SD2);

2) The accused admitted that he was not on good terms with the neighbours (deceased's family), reason being the issue of the gate;

3) On the day in question, after the accused got up from sleep, he had taken his diabetic medication (said to be "Amaryl") and went on to sweep the front of his house. He also said he did gardening on the side of his house;

4) The accused said he saw the deceased riding his motor cycle pass the place where the accused was gardening. The deceased uttered words in Hokkien which the accused said was to the effect of "emak saya ditiduri oleh orang lain dan lahirkan anak seperti saya";

5) The accused claimed that the deceased approached him and hit him on the back of his head causing him to nearly fall;

6) The accused then claimed that after being hit by the deceased he went blank and did not know what happened then;

7) The accused claimed that he was given a drink (prune juice) by SD6. After a while he washed his hands and went to the police station as he felt he had killed someone (said in re-examination).

[31] On a close scrutiny of the defence the following would show or indicate the evidence has very many gaps and unanswered questions:

1) If the deceased was the one who started by verbally abusing the accused, why would the deceased be the one to hit the accused on the head;

2) The accused said he was given prune juice and then he washed his hand and left on a motorcycle whilst SP6 (the accused wife) said she slapped the accused on his cheek, asked him to wash his hand, gave him prune juice before the accused left on a motorcycle; and

3) The accused stated he went to the police station after the incident because he felt he had killed someone but at the same time said he was not aware of what happened to him after was hit on the head by the deceased.

[32] Therefore there are contradictions in the evidence for the defence. However it also has to be examined whether the defence of unawareness or automatism due to the attack of hypoglycemia can succeed in this case.

[33] The accused called an expert to testify as to his condition when the incident happened ie, Dr. M. Mahadevan (SD4) and in rebuttal the prosecution called Dr. Nor Azmi bin Kamaruddin (SP11).

[34] SD4 is a Consultant Psychiatrist attached to Ipoh Specialist Centre as Madhuban Clinical Director and Senior Consultant Physician Psychiatrist.

[35] The relevant evidence of SD4 is reproduced below. The evidence is part of a prepared questions and answers:

Q: Taking into account history of Mr. Hoo Ah Tee and the interview that you had with him and the family is there a possibility that on the 12th August 2010 he had suffered neuroglycopenia?

A: It cannot be **ruled out that he did not suffer from neuroglycopenia that day,** but from the fact that he took his diabetic medication, his behaviour was out of character of a 65 years old man, he had been doing some vigorous gardening, there was a genuine Amnesia for a period preceding and immediately after the event. He had thus satisfied five out of the seven criteria as stated by Professor Vincent Marks in his above mentioned paper. Therefore in all probability he had suffered neuroglycopenia at the time of the incident and was not aware of what he had done during this period of temporary brain malfunction. This fact was also recognized in an article by Frier BM from the Royal Infirmary Edinburgh, published in the International Journal of Clinical Practice 2001 Sep; (123):30-7 (8th Article in index at page 79). Quote "The human brain is almost totally dependant on a continuous supply of glucose, deprivation of which rapidly causes malfunction."

Q: Would you say a person suffering hypoglycaemic was aware and in control of what he was doing?

A: In this medical state he certainly would not be aware of what he was doing and consequently incapable of formulating any intent.

Q: From your observation and interview of Mr. Hoo Ah Tee was he aware and in control of what he was doing on the morning of the 12th August 2010?

A: Taking into account his medical condition, his character there was no way whatever he was aware and in control of what he was doing on the morning on the 12th August 2010. He had no intention whatsoever to assault let alone take someone's life that morning. He was not suffering from any disease of the mind but due to a cerebral metabolic insufficiency/cerebral metabolic encephalopathy.

[36] SD4 in no uncertain terms stated that the accused "was no way whatever he was aware and in control of what he was doing on the morning of 12 August 2010."

[37] However, the expert called by the prosecution in rebuttal was Dr. Nor Azmi Kamaruddin (SP11), an Endocrinologist attached to the Department of Medicine, UKM Medical Centre, Malaysia. Amongst his post-graduates qualification is Masters of Medicine (Internal Medicine and Clinical Trainees in Endocrinology).

[38] The pertinent part of the evidence of SP11 in relation to the accused medical condition is as follows:

(1) SD2, the doctor attending to the accused said that the accused did not have any record of having hypoglycaemic attach prior to this incident;

(2) A person attacked by hypoglycemia would have the symptom described below:

Hypoglycemia can lead to the 3 conditions ie, Automatism, Global Amnesia and Neuroglycopenia. However, prior to the developing any of that there were warning signs and symptoms. Prior to the developing to any of the one above, the blood sugar in one's body needs to come down and the body started to feel weak. Prior to that, the subject feels hungry and if not corrected he started to feels weak. Hunger and feel weak then the automatic nervous system will start to come in and then symptom like increase sweatiness palpitation tremors and if this not corrected, lost of consciousness and if it left untreated it will caused death. The first symptom, feeling hunger as the blood sugar level down. If not corrected, you start to feel weak, generalised weakness (as though you have no energy). You can't move

A or stay put. If it left untreated, the body produce other warning sign; the heartbeat very fast, started to sweat, started to tremble and become very pale and slowly into unconscious state. During the state of unconsciousness, it may shake the limb legs and if not treated subject to succumbed to death;

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(3) "Generally when somebody experience hypoglycemia, not only blood sugar low in the brain but also low somewhere in other body for example muscle, less fuel to the muscle. Thus to perform an act that require strength, repetitively is impossible."

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[39] Now, when there are two (2) experts the courts would have to decide whose evidence the court would accept. In this case, it is not disputed SD4 is well known. He is a renowned psychiatrist, if I may say not only in Malaysia but internationally. I would

D venture to state that. However his field is psychiatry.

[40] On the other hand, SD11, his curricular vitae (P56) evidences that he is an Endocrinologist, the right field for diabetes and hypoglycemia. Further, SD4 was called by the defence to give

E evidence for the accused. Surely this would mean he is a non independent witness whilst in comparison SP11 is an employee of the UKM and would have no interest whatsoever in this case.

[41] Therefore the court has no choice but to accept SP11 as the right/appropriate independent expert. From his evidence it is

F very clear that:

(1) For an attack of hypoglycemia, there would be symptoms/ warning signs like hunger and weakness. In the case of the accused there was no such symptoms.

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(2) A person in a hypoglycemia state would not be able to perform "an act that required strength, repetitively is impossible". In this case the accused slashed the deceased at three (3) places, acts which a person under such an attack

H could not have done.

(3) A person under such an attack would not revert to his normal condition just with a prune juice as stated by SP11 – "the prune juice and '100 plus' can reverse the hypoglycemia but it is usually transient. If the whole event takes more up to 1

I hour or more, the hypoglycemia tends to recur and develop

the symptom and signs. A mere prune juice diluted by 100 plus may not be able to sustain somebody blood sugar for a long period especially for a person who got Amaryl on the system." However the accused said he was alright after being slapped by his wife, given prune juice and then was able to ride his motorcycle to the police station and relate what have happened.

[42] From what was said by P11, it is clear, if the accused was in a state of an attack of hypoglycemia, he would not have had the strength to slash the deceased as he did and he would not have "recovered" so soon as to realise his act and ride the motorcycle to the police station.

[43] Having considered the evidence of SD4 and SP11 it is not probable that the accused was unaware of his act that caused the death of the deceased. The accused was in fact as what was stated by Richard Malanjum (FCJ as he then was) in *Kenneth Fook Mun Lee v. PP (supra)* at p. 155 repeating the words of the Court of Appeal – "... that the weight of evidence clearly established that the respondent was very much in control of his action ..." Therefore the defence of unawareness or automatism by reason of hypoglycemia must fail.

[44] Since the prosecution had made out a *prima facie* case against the accused if unrebutted would warrant a conviction and the court finds that the accused had not rebutted the prosecution case, the accused was found guilty as charged, convicted and sentenced to death, the only punishment available for an offence under s. 302 of the Penal Code.